IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 906.

WALTER SCOTT WATSON, *Petitioner*,

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, A CORPORATION, *Respondent*.

No. 907.

KATHRYN NICOLL WATSON, *Petitioner*,

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, A CORPORATION, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

STATEMENT OF THE CASE.

In addition to the facts stated in the "Summary Statement" contained in the petition for the writ of certiorari,

the following fact should also be taken into consideration:

The insurance policies which petitioners caused to be issued on the life of Richardson, their debtor, were so caused to be issued for the purpose of protecting the indebtedness owing by the insured to petitioners (R. 2, 10).

REASONS FOR DENYING THE WRITS.

I. The amounts involved are small and no Federal question or question of general importance is presented.

II. The case was decided in accordance with the local law of the District of Columbia.

III. Conflict among the circuits as to questions controlled by local law, is not ground for granting certiorari.

IV. This Court does not have jurisdiction to grant certiorari in these cases.

V. The judgments appealed from were correct.

I.

The Amounts Involved Are Small and No Federal Question or Question of General Importance Is Presented.

The amounts involved are $1871.10 in No. 906 and $1940.40 in No. 907. If these actions had been brought in one of the States, no Federal District Court would have had jurisdiction of them under 28 U. S. C. sec. 41(1), and they could under no conceivable circumstances have come before this Court. The cases involve neither a Federal question, nor one of general importance, being simply a controversy arising from an alleged breach of a contract relating to life insurance. There is no element in the cases which commends them for consideration by the highest Court of the land.

It is important that certiorari be not granted except in cases involving principles the settlement of which is of im-

portance to the public as distinguished from that of the parties.

Layne &c. Co. v. *Western Well Works*, 261 U. S. 387, 393.

II.

THE CASES WERE DECIDED IN ACCORDANCE WITH THE LOCAL LAW OF THE DISTRICT OF COLUMBIA.

The Court of Appeals, in holding that petitioners were not entitled to recover the premiums paid, followed the law of the District of Columbia, as enunciated by its previous decision in *Capital City Benefit Society* v. *Travers*, 55 App. D. C. 214, 4 F. (2d) 290. The argument for petitioners, based on absolute repudiation is not applicable, as there was no repudiation.

III.

CONFLICT AMONG THE CIRCUITS AS TO QUESTIONS CONTROLLED BY LOCAL LAW IS NOT GROUND FOR GRANTING CERTIORARI.

Even if it were conceded that the decision of the Court of Appeals is in conflict with decisions of Circuit Courts of Appeals, that would not be ground for granting the writs in these cases. There is no general law of the United States governing matters of contract, where no Federal statute or Federal Constitutional provision is involved. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. Conflicts among the circuits in regard to non-Federal questions are therefore no ground for granting certiorari. *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, 205.

IV.

This Court Does Not Have Jurisdiction to Grant Certiorari in These Cases.

The cases do not present any question within the jurisdiction of the Federal judiciary under Article III, sec. 2 of the Constitution. The controversy does not arise under the Constitution or under any law of the United States, is not between citizens of different States, and does not fall within any of the other classes of cases enumerated in Article III, sec. 2.

V.

The Judgments Appealed From Were Correct.

1. *Claims affording grounds for relief are not stated by complaints which aver that after assignments of life-insurance policies were executed, the insurance company expressed an opinion as to the legal effect of such assignments at variance with the opinion expressed by it at the time of the issuance of the policy and the execution of the assignments, in the absence of any averment that the company has refused to perform any of its obligations under the contracts of insurance or under the assignments.*

The complaints fail to state whether the insurance was written for a term or for the life of the insured. It does not appear that the policies were in effect at the time of the expressions of opinion referred to in the complaints (R. 3, 11).

There is no allegation that the policies have matured by the death of the insured or that respondent has ever refused or stated that it would refuse to make payment in accordance with the policies and the assignments thereof, to make any loan on the policies, to pay the cash surrender value thereof, or to comply with any of the terms of the policies.

It therefore does not appear that petitioners have sustained any damage and their complaints fail to state claims upon which relief can be granted.

2. *When policies of life insurance are in fact assigned as collateral security for indebtednesses owing by the insured to the assignees, the assignees are entitled only to the amounts of their debts, with interest thereon, plus the premiums paid by the assignees.*

Even though a policy may be assigned to one who has no insurable interest in the life of the insured (*Grigsby* v. *Russell*, 222 U. S. 149), nevertheless, if, as is here the case, the assignment was in fact made as collateral security, it will be so considered even though absolute in form, and if the insurer has knowledge or notice of that fact, it does not have the right to pay to the assignee any more of the proceeds of the policy than is necessary to satisfy the debt thereby secured, with interest, plus premiums paid by the assignee.

Cammack v. *Lewis*, 15 Wall. 643.
Connecticut Life Insurance Co. v. *Schaefer*, 94 U. S. 457.
Warnock v. *Davis*, 104 U. S. 775.
First National Bank of Roanoke v. *Terry's Adm'r.*, 99 Va. 194, 37 S. E. 843.
Tate v. *Commercial Building Association*, 97 Va. 74, 33 S. E. 382.
New York Life Insurance Co. v. *Kansas City National Bank*, 121 Mo. App. 479, 97 S. W. 195.
McDonald v. *Birss*, 99 Mich. 329, 58 N. W. 359.
Cawthon v. *Perry*, 76 Tex. 383, 13 S. W. 268.

The fact that the insured was indebted to petitioners was known to respondent at the time of the issuance of the policies and the execution of the assignments. Although the assignments were absolute in form, they were intended as collateral security for the payment of Richardson's debts to petitioners (R. 2, 10). As this was the

understanding between the parties in interest the assignments of the policies did not divest the insured of his general property in the policies.

Clark v. *Equitable Life Assurance Society*, 133 Fed. 816.

The court below was not required to determine the question of the rights of petitioners under their assignments. As will appear from the cases cited, there was at least respectable authority for the position taken by respondent, and it was justified in adopting the cautious attitude of not committing itself to the theory sought to be maintained by petitioners.

3. *The rights of a creditor-assignee of a life-insurance policy are at least as great as those of a creditor-beneficiary.*

It is difficult to ascertain what is the basis of petitioners' alleged grievances. In paragraph 5 of each of their complaints (R. 2, 10) they say that respondent "represented to the plaintiff that it would issue a policy payable to the estate of William E. Richardson and accept from the said Richardson an absolute assignment thereof to plaintiff thereby making the plaintiff the sole owner of all right, title and interest in and to said policy and accomplishing the same results as would be created if the policy named plaintiff as beneficiary."

They further aver in Paragraph 11 (R. 3-4, 11-12) that they bargained with respondent for policies over which they would have absolute control because of sole ownership thereof.

It does not appear how petitioners would have become the sole owners of the policies, or how they would have had absolute control over them if they had been named as beneficiaries thereof. Certainly the beneficiary of a life insurance policy is not the owner of it and has no control over it by virtue of his designation as such, even though

such designation be irrevocable. The extent of his power is to prevent a change of beneficiary, or a surrender or pledge of the policy by the insured, unless the insured has reserved the right to do so.

Bingham v. *United States*, 296 U. S. 211, 217.
Central Bank of Washington v. *Hume*, 128 U. S. 195.
Mutual Benefit Life Insurance Co. v. *Swett*, 222 F. 200.

A beneficiary, even under an irrevocable designation, may not surrender the policy, pledge it, change any of its terms or in any manner "control" it except, if the designation is irrevocable, negatively by vetoing any change which would affect his interest in the proceeds.

An assignee of the policy has more control over the policy than has the beneficiary, and may surrender it and receive its cash value upon default in the payment of the indebtedness.

Moon v. *Williams*, 102 Fla. 214, 135 So. 555.
Bank of Idana v. *Illinois Life Insurance Co.*, 135 Kan. 129, 9 P. (2) 629.

See also *Higgins* v. *Helmbold*, 48 App. D. C. 50.

If petitioners had been designated as beneficiaries for the purpose of securing the indebtednesses owing to them, their rights would have been no greater than their rights as assignees, and would have been limited to the amount of their debts, premiums and interest.

Central Bank of Washington v. *Hume*, 128 U. S. 195, 205.
Crotty v. *Union Mutual Life Insurance Company*, 144 U. S. 621, 624.
Peoples Life Insurance Co. v. *Whiteside*, 94 F. (2) 409.
Tateum v. *Ross*, 150 Mass. 440, 23 N. E. 230.
Mutual Life Insurance Co. v. *Wager*, 27 Barb. (N. Y.) 354.
Goldbaum v. *Blum*, 79 Tex. 638, 15 S. W. 564.

It thus appears that petitioners, by virtue of the assignments of the policies, obtained not only as great, but greater rights than they would have obtained if they had been named as irrevocable beneficiaries of the policies.

The form of the documents executed to protect the creditors is of no moment. If under the law of the District of Columbia a creditor is entitled to the full proceeds of the insurance, he will receive such proceeds whether he be named as beneficiary or as absolute assignee. If under that law a creditor is entitled only to the amount of his debt with interest plus premiums, he will receive that and no more, whether he be named as beneficiary, collateral assignee or absolute assignee.

In this view it was unnecessary to the decision of these cases to determine the rights of petitioners, whether to all of the proceeds or to only so much thereof as should be sufficient to pay the debts with interest and premiums. Their rights are not affected by the circumstance of whether they were named as benficiaries or as assignees.

4. *An expression of opinion by an insurer as to the legal effect of an assignment of a policy, even if erroneous, is not ground for rescission.*

One cannot rescind a contract except for circumstances recognized as legal cause for rescission. Differences of opinion as to correct construction of a contract do not constitute ground for rescission.

Milliken-Tomlinson Co. v. *American Sugar Refining Co.*, 9 F. (2) 809, 812.
Hairston v. *Hill*, 118 Va. 339, 344, 87 S. E. 573, 575.

Even if the expression of opinion of respondent as to the applicable legal principles had been erroneous, such expression would not constitute fraud. Petitioners were equally chargeable with knowledge of the correct legal interpretation of the assignments and had no right to rely

upon the legal opinion of respondent. If they did so rely, such reliance does not invalidate the policies.

Upton v. *Tribilcock*, 91 U. S. 45.
Burk v. *Johnson*, 146 Fed. 209.
Thompson v. *Phoenix Insurance Company*, 75 Me. 55.
The Aetna Insurance Company v. *Reed*, 33 Ohio State 283.
Rutter & Hendrix v. *Hanover Fire Ins. Co.*, 138 Ala. 202, 35 So. 33.

Mistake of law is not ground for rescission.

Lamborn v. *Dickinson County Commissioners*, 97 U. S. 181, 184.
The Bank of the United States v. *Daniel, et al.*, 12 Pet. 32, 56.
Lester v. *Mayor and City Council of Baltimore*, 29 Md. 415.
Stewart v. *Ticonic Natl. Bank*, 104 Me. 578, 72 Atl. 741.
Mackin v. *Dwyer*, 205 Mass. 472, 476, 91 N. E. 893, 894.
Janicke v. *Washington Mutual Telephone Company*, 96 Kan. 309, 150 Pac. 633.
Taylor v. *Buttrick*, 165 Mass. 547, 43 N. E. 507.
Carter v. *Love*, 206 Ill. 310, 69 N. E. 85.

5. *There can be no rescission of a contract which has been partially performed by the party against whom rescission is sought, or where it is not possible to restore the status quo.*

The policies were issued in September, 1933, and continued in force for a certain length of time. This length of times does not appear as to the policy issued to Walter Scott Watson, but from the second count of the complaint of Kenneth Nicoll Watson (R. 12), it appears that the policy assigned to him was in force for about seven years. During the periods that these policies were in force petitioners had the protection of the insurance, at least to the

amount of their claims against the insured, with interest, plus the premiums paid and, if their theory is correct, to the full amount of the insurance; and respondent was under liability in respect of the insurance. Petitioners sought, by rescission, to recover the entire amount of the premiums paid, and thus to put themselves in a position where they would have had the benefit of the protection afforded by the policies, at no cost. Rescission is an equitable remedy, governed by equitable principles, and the situation sought to be created by petitioners is unconscionable and inequitable.

A party who has received and retained the benefits of a substantial part performance by the other cannot rescind.

Kauffmann v. *Raeder*, 108 F. 171.

A condition of rescission is the return of the consideration received by the party seeking to rescind.

Rutland Marble Co. v. *Ripley*, 10 Wall. 339, 355.

"That one party to an executory contract, partly executed, has violated his engagements, is generally no sufficient reason for a decree by a court of equity, at the suit of the other party, that the contract shall be annulled."

Rutland Marble Co. v. *Ripley*, 10 Wall. 339, 355.

In suits for recission of contracts the maxim that he who seeks equity must do equity is generally applied, so that the party against whom relief is sought shall be remitted to the position he occupied before the transaction complained of. Even the perpetrator of a fraud is not regarded as an outlaw.

Pan American Petroleum and Transportation Co. v. *United States*, 273 U. S. 456, 505 and cases cited.

6. *An expression of opinion by an insurer as to the legal effect of an assignment of a policy, even though erroneous, is not an anticipatory breach.*

"Repudiation by one party, to be sufficient in any case to entitle the other to treat the contract as absolutely and finally broken and to recover damages as upon total breach, must at least amount to an unqualified refusal, or declaration of inability, substantially to perform according to the terms of his obligation."

Mobley v. *New York Life Insurance Company*, 295 U. S. 632, 638.
Dingley v. *Oler*, 117 U. S. 490, 502.

Mere refusal, upon mistake or misunderstanding as to matters of fact or upon an erroneous construction of the contract does not amount to a renunciation or repudiation, particularly in the absence of bad faith.

Mobley v. *New York Life Insurance Company*, 295 U. S. 632, 638.
New York Life Insurance Co. v. *Viglas*, 297 U. S. 672, 676.
Suburban Improvement Co. v. *Scott Lumber Co.*, 67 F. (2d) 335, 337.
Daley v. *People's Building &c. Assoc.*, 178 Mass. 13, 18, 59 N. E. 452, 453.

"To amount to an anticipatory breach of a contract, the renunciation by the promisor must be clear and unequivocal, and the refusal to perform must be of the whole contract or of a covenant going to the whole consideration. * * *

"An offer to perform in accordance with the promisor's interpretation of the contract although erroneous, if made in good faith, is not such a clear and unequivocal refusal to perform as amounts to a renunciation giving rise to an anticipatory breach. * * *"

Kimel v. *Missouri State Life Insurance Company*, 71 F. (2d) 921, 923.

"If this were not the law, it would be a dangerous thing to stand upon a controverted construction of a contract. Every man would act at his peril in such cases, and be subjected to the alternative of acquiescing in the interpretation adopted by his opponent, or putting to hazard his entire interest in the contract. The courts have never imposed terms so harsh or burdens of such weight. It would amount to a virtual denial of the right to insist upon an honest, but erroneous, interpretation."

Armstrong v. *Ross,* 61 W. Va. 38, 48, 55 S. E. 895, 899, quoted with approval in *Kimel* v. *Missouri State Life Insurance Company,* 71 F. (2d) 921, 923.

Even if the assignments operated as absolute assignments as a matter of law, the authorities cited herein to the contrary effect (*ante* pp. 5-6) show that the contention of respondent was made in good faith, and, in fact, there is no claim of bad faith anywhere in the complaints.

7. *Petitioners sustained no damage.*

If petitioners' contentions as to the effect of the assignments are correct, they have sustained no damage, as the courts will enforce their rights; if petitioners are wrong, they are entitled to no relief, as they are bound by the legal consequences of their transactions; in either event, the record discloses no damage or injury to the plaintiffs.

When there is no damage there can be no recovery.

Western Union Telegraph Co. v. *Nester,* 309 U. S. 582.
Marye v. *Parsons,* 114 U. S. 325, 329.
Weiss v. *The District Title Insurance Co.,* 74 App. D. C. 126, 121 F. (2d) 900.
McAllister v. *Clement,* 75 Calif. 182, 16 P. 775.
Uppinghouse v. *Mundel,* 103 Ind. 238, 242, 2 N. E. 719, 721.
Watson v. *Southern Ry. Co.,* 104 S. C. 204, 88 S. E. 461.

CONCLUSION.

It is therefore respectfully submitted that the writs should be denied.

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